SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 760

STATE OF CALIFORNIA AND BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR,

Appellants,

vs.

THE UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION, ENCINAL TERMINALS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 22000-R

STATE OF CALIFORNIA AND BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR,

Petitioners and Appellants,

vs.

UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION,

Defendants and Appellees.

ENCINAL TERMINALS, HOWARD TERMINAL, AND PARR-RICHMOND TERMINAL, CORPORATION,

Interveners and Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Rule 12 of the Supreme Court of the United States this statement is filed disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the final decree herein of the District Court of the United States for the Northern District of California, Southern Division.

I.

Statutory Provisions Sustaining Jurisdiction.

Section 210 of the Judicial Code, as amended (U. S. Code, Title 28, Sec. 47a) provides as follows:

"A final judgment or decree of the district court in the cases specified in section 44 of this title may be

reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

Title 28, Sec. 47, U. S. Code, provides in part as to an appeal from a final decree of a statutory three-judge court:

"* * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (Act of Oct. 22, 1913, c. 32, 38 Stat. 220.)

These provisions of law are made applicable to orders of the United States Shipping Board (now United States Maritime Commission), such as the order here involved. Section 31 of the Shipping Act, 1916, as amended (U. S. Code, Title 46, Sec. 830; 39 Stat. 738) provides as follows:

> "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district courts having jurisdiction of the parties. (Sept. 7, 1916, c. 451, § 31, 39 Stat. 738.)

II.

The Order, the Validity of Which Is Involved.

The proceedings in the United States District Court, from the final decree in which this appeal is taken, sought to set aside, annul and enjoin the enforcement of an affirmative order of the United States Maritime Commission issued and made on September 11, 1941, in a proceeding before said Commission and designated "IN THE MATTER OF SERVICES, RATES, CHARGES, TOLLS, RENTALS, RULES, REGULATIONS, CLASSIFICATIONS, AGREEMENTS, ACTS, PRACTICES, AND OPERATIONS OF THE SAN FRANCISCO BAY AREA TERMINALS NAMED HEREIN" and numbered 555 on the Docket of said Commission.

In its said order the said Commission; among other things, ordered all of the respondents in said proceeding, among which were the petitioners and appellants herein, to cease and desist on or before October 27, 1941, and thereafter to abstain from allowing greater periods of free time for merchandise to remain upon the wharves of said respondents than those prescribed in said order; to cease and

desist on or before October 27, 1941, and thereafter to abstain from publishing, demanding or collecting wharf demurrage and wharf storage rates less than the minimum rates prescribed in said order; and to file with said Commission and keep open to public inspection schedules showing the rates and charges for the furnishing of wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water. (The order is set out in full in Exhibit "A", attached to the petition and bill for injunction herein.)

III.

Date of Decree and of Presentation of Application for Appeal.

The final decree sought to be reviewed was entered on December 1, 1942, in the District Court of the United States for the Northern District of California, Southern Division. The petition for appeal herein is presented this 31st day of December, 1942.

IV.

Nature and Significance of the Case and the Jurisdiction of the Proceedings.

Petitioners and appellants herein are the State of California, a sovereign State of the United States, and the Board of State Harbor Commissioners for San Francisco Harbor, a duly constituted agency of said State. Said State is, and during all of the times herein mentioned has been, the owner of all of the facilities of San Francisco Harbor, consisting of some forty-five wharves and piers, Ferry Building, Refrigeration Terminal and other structures, all of which are built partly upon and extend over submerged tidelands of the Bay of San Francisco and partly upon filled and reclaimed lands which have been owned by the

State in its sovereign capacity since its admission into the Union, and said State at all times mentioned in the proceedings before the Maritime Commission was and now is administering all of the facilities of said harbor, including a Belt Line Railway, by and through said Board.

On November 7, 1939, the Commission initiated the proceeding before it in Docket 555 on its own motion, making petitioners and appellants, among many others, respondents therein for the purpose of investigating and determining whether the services, rates, charges, tolls, rentals, rules, regulations, classifications, agreements, acts, practices, and operations of all of respondent terminals were in violation of Sections 15, 16, 17 and 20 of the Shipping Act of 1916, as amended.

Hearings in said proceeding were held in San Francisco on February 13 to 16, 19, 20, and 21 and October 7 to 9, 1940, and the matter having been submitted and briefed and argued before the Commission, said Commission made and filed its order hereinabove referred to.

At the outset of the hearing before the Commission the petitioners and appellants herein moved the Examiner conducting the hearing for a dismissal of the proceeding as to them and each of them, which motion was denied by the Examiner, and said petitioners and appellants then appeared generally in said proceeding. Said motion was renewed at the conclusion of the hearing and was in words and figures as set out in Exhibit "A" to the Answer of the United States of America and the United States Maritime Commission, defendants and appellees herein. Said motion was also denied by the Examiner.

The evidence taken at the hearing before the Commission consisted of testimony of many persons connected with the operations of the various respondent terminals, including certain officers of petitioners and appellants, all called as witnesses for the Commission, and also received in evidence

a great number of documents consisting in part of tariffs of the various respondents, including those of petitioners and appellants, maps and diagrams showing the location of their facilities, and financial statements relating to the revenues and expenses of respondents, including those of petitioners and appellants.

All of the evidence with relation to the operations, practices, rates and charges of petitioners and appellants was received over their objection that the Commission was without jurisdiction to inquire into any of the matters or things being investigated as to petitioners and appellants, or to take any testimony concerning the same, or to determine or make any orders concerning them.

That part of the said order of the Commission made and issued on September 11, 1941, ordering the petitioners and appellants, among others, to desist from charging certain rates for wharf demurrage and wharf storage in excess of the minimum prescribed in said order, was based upon a finding made by the Commission that the existing rates of respondents for such wharf demurrage and wharf storage was in general non-compensatory, though no such specific finding was made with respect to the rates of petitioners and appellants. There was no evidence taken or received at said hearing with respect to the cost of wharf demurrage and wharf storage upon the facilities administered by petitioners and appellants.

At said hearing before the Commission testimony was also taken as to the practices, rates, rules and regulations in regard to wharf demurrage and storage at ports on Puget Sound in the State of Washington and also at the port of Portland in the State of Oregon, but in making its said order of September 11, 1941, said Commission made no order with respect to such rates. There was evidence before the Commission that all of the ports around Puget Sound in

the State of Washington and the Port of Portland in the State of Oregon were in competition in trans-Pacific trade with the Harbor of San Francisco, operated by the State of California by and through the Board of State Harbor Commissioners for San Francisco Harbor, petitioners and appellants herein.

Summarizing, it is the contention of these petitioners and appellants:

1. That the Shipping Act, 1916, as amended, has no application to them or either of them;

2. That Congress has no power to regulate them or either of them in any matters relating to the rates, charges, practices, rules or regulations in connection with their operation or management of San Francisco Harbor;

3. That neither of petitioners and appellants is "a person subject to the provisions of this Act", as defined in the Shipping Act, 1916, as amended;

4. That there was no evidence in said proceeding before the Commission as to whether any of the rates or charges of the State of California, operating the Harbor of San Francisco, were or are compensatory;

5. That the order of the Commission was void and of no effect for the reason that it violates Clause 6, Section 9 of Article I of the United States Constitution in that it gives a preference by regulation of commerce or revenue to the ports of the States of Washington and Oregon over the port and harbor of San Francisco in the State of California.

After the making and issuing of the Commission's order of September 11, 1941, the suit in the instant case was filed in the District Court of the United States for the Northern District of California, Southern Division, to set aside, annul and enjoin the enforcement of the said order in accordance

with Sections 24, 208 and 209 of the Judicial Code (U. S. Code, Title 28, Secs. 41 (28), 45 and 46).

Pursuant to the provisions of the District Court Jurisdiction Act (Oct. 22, 1913, c. 32, Title 28 U. S. Code, Sec. 47, 38 Stat. 220) a specially constituted statutory three-judge court was convened for the purpose of hearing the cause, and at a hearing before said Court on October 29, 1941, said Court granted an interlocutory injunction as prayed for in the petition, and a formal order therefor was made by said Court on November 8, 1941, and interlocutory injunction issued on November 10, 1941.

The final hearing was held before said Court on the 26th day of February, 1942, and thereafter the final decree dissolving the interlocutory injunction, denying a permanent injunction, and dismissing the proceedings was made and entered by said Court on December 1, 1942.

The appeal herein is from this final decree.

V.

The Questions Involved Are Substantial.

Petitioner and appellant, State of California, as hereinabove stated, is the owner of all of the harbor facilities of San Francisco Harbor and at all times mentioned in the investigation before the United States Maritime Commission was administering and is now administering the same by and through an agency of said State, to wit, the Board of State Harbor Commissioners for San Francisco Harbor.

The powers and duties of said Board of State Harbor Commissioners are contained in Division VI, Sections 1690-3231, of the Harbors and Navigation Code of the State of California. In the construction, maintenance and administration of these harbor facilities the State of California is exercising a governmental function.

Denning v. *State*, 123 Cal. 316, 55 Pac. 1000;
Sherman v. *United States*, 282 U. S. 25;
Platt v. *Commissioner*, 35 B. T. A. 472;
Commissioner v. *Ten Eyck*, 76 Fed. (2d) 515 (C.C. A. 2);
California v. *Anglim*, 37 Fed. Supp. 663.

Congress has no power, in the exercise of the power to regulate interstate commerce or otherwise, to regulate these purely governmental functions of the State of California.

Gibbons v. *Ogden*, 9 Wheat. 1;
Cincinnati etc. Packet Co. v. *Catlettsburg*, 105 U. S. 559;
Keokuk North Line Packet Co. v. *Keokuk*, 95 U. S. 80, 88.

The Supreme Court of the United States has never held that Congress, by virtue of the power to regulate commerce or any other power granted by the Constitution of the United States, has power to regulate the activities of a sovereign State of the United States engaged in the maintenance, construction or operation of harbor facilities owned by a State.

It is the contention of petitioners and appellants on this appeal, as shown by the assignment of errors, that the Shipping Act of 1916, as amended (39 Stat. 728; 46 U. S. C. A., Secs. 801-842), does not purport to apply and does not apply to either of these appellants.

Section 1 of said Act provides as follows:

> "• • • The term 'other person subject to this act' means any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.
>
> "The term 'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country, • • •"

This section also contains a number of other definitions.

The Act, as amended, creates the United States Maritime Commission and authorizes it to make certain investigations and determinations and orders hereinafter referred to. Section 15 of the Act requires the filing of true and complete memoranda of certain agreements described therein and gives the Commission certain powers with respect to the disapproval, cancelling or modifying of agreements, and provides a penalty for the violation of any of the provisions of said section.

Section 16 provides, among other things, that it shall be unlawful for any common carrier by water or "other person subject to this Act", either alone or in conjunction with any other person, directly or indirectly—

> "First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 provides as follows:

> "That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.
>
> "Every such carrier and every other person subject to this act shall establish, observe, and enforce just and

reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Section 18 provides that every common carrier by water in interstate commerce shall "establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to * * * the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property. * * *" The section further provides that:

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

There is no mention in this section of "other person subject to this Act".

Section 20 contains provisions relating to certain acts forbidden to common carriers by water and "other persons subject to this act", but has no provisions relating to charges or establishment of rates by such persons. The Act further authorizes the investigation of violations of the Act, the holding of hearings, the making of reports, the issuing of orders, and the penalties for violations of the same.

If the Act does not apply to these appellants, the Commission had no jurisdiction of either of them in the proceeding in Docket 555.

The application of Section 1 to public bodies has been considered by the Commission in United States Maritime Commission No. 481, *Wharfage Charges and Practices at Boston, Massachusetts*, 2 USMC 245, but never by any state court nor by the Supreme Court of the United States nor by any inferior federal court.

Another question raised by the assignment of errors on this appeal is the contention of appellants that neither of them is subject to said Act because neither has at any time been engaged in "the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water", or in any business whatsoever. The wharfage charges imposed by appellants in the administration of San Francisco Harbor are by law restricted to an amount sufficient to pay the expenses incurred in the administration of the Harbor.

> Secs. 3080 and 3084, Harbors and Navigation Code of the State of California.

And as shown by the record, the Harbor in practice is actually conducted in accordance with the law.

A subordinate point involved in this same question is whether the activities of these appellants are carried on "in connection with a common carrier by water", and if they are not so carried on, the Commission had no jurisdiction of either of appellants in Docket 555. An examination of the record is necessary to determine this question, and the contention of appellants is that they are not carrying on such activities in connection with a common carrier by water. Neither of the last two questions has been passed upon by any court.

There is another closely related question raised on this appeal upon which the jurisdiction of the Commission over appellant depends, namely, whether under Sections 15 to 17, inclusive, and Sections 20 and 21 of the Shipping Act of 1916, as amended, or any other provisions of said act, the Commission has jurisdiction over the regulation of free time or demurrage or storage rates or charges of any person administering or operating wharf facilities, and particularly in the manner in which the wharf facilities of the appellants are administered. It is the contention of appellants that the Commission has no such jurisdiction. The only decision in point, brought to the attention of appellants, is *McNeely & Price Co.* v. *Philadelphia Piers, Inc.*, 196 Atl. 846 (Pa.), in which the court said, by way of dicta, that the Commission apparently has such jurisdiction. On account of the fact that this statement is merely dicta and is not supported by any reasoning whatsoever, the question is still a substantial one and is still open and should be decided by the Supreme Court.

The assignments of error also raise the question whether the order of September 11, 1941, of the Commission is not void and of no effect for the reason that it violates Clause 6, Section 9 of Article I of the United States Constitution. While there have been decisions of the Supreme Court of the United States interpreting this question generally, there has been no decision of said court upon the question whether in regulating free time and rates of wharf demurrage in the ports of one State to such an extent that said rates are placed in a more unfavorable competitive situation than previously existed with respect to ports in other States, the Commission has violated the above mentioned constitutional provisions. Appellants contend that the decisions in the Supreme Court of the United States do not apply to the facts of the case on this appeal for the reason that in making the above mentioned order the Commission took testi-

mony as to the rates in existence at the ports in the other States and that its investigation of such rates was broad enough to enable it to make an order in the same proceeding regulating the rates of such ports in the other States.

Finally there is involved on this appeal the question whether the decision of the District Court should not be reversed for the reason that there was no evidence before the Commission in Docket 555 as to the cost of furnishing wharf storage and demurrage on the facilities of these appellants, and because there was no specific finding by the Commission that such charges were non-compensatory. In analogous cases involving orders of the Interstate Commerce Commission, it has been held that such orders are void if not supported by appropriate findings.

Powell v. *United States*, 300 U. S. 276, 81 L. Ed. 643;
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 295 U. S. 193, 79 L. Ed. 1382.

And in like cases orders unsupported by evidence are void.

Chicago Junction Case, 264 U. S. 258, 481, 68 L. Ed. 667;
Morgan v. *United States*, 298 U. S. 468, 481.

For all the reasons hereinabove stated, appellants submit the questions raised on this appeal are substantial.

VI.

Cases Believed to Support the Jurisdiction.

Swayne & Hoyt et al. v. *The United States of America*, 300 U. S. 297, 57 S. Ct. 478, involved the validity of an order of the Secretary of Commerce based upon a report of the United States Shipping Bureau, Department of Commerce, the predecessor of the United States Maritime Commission. In this case an appeal was taken from a final decree of the United States District Court for the District of

Columbia, following the procedure provided in Sections 47 and 47a, Title 28, U. S. Code.

The procedure for the review of orders of the Interstate Commerce Commission is identical with that for the review of orders of the United States Maritime Commission and, according to such procedure, appeals from decisions of statutory three-judge courts reviewing Interstate Commerce Commission orders have often been heard by the Supreme Court of the United States. Cases in point include *United States* v. *Illinois Central Railway*, 263 U. S. 515, and *Baltimore & Ohio Railroad Co.* v. *United States (Chicago Junction case)*, 264 U. S. 258.

These and many other cases are believed to support the jurisdiction of this Court in the case at bar.

VII.

Opinion Below.

The District Court of the United States for the Northern District of California, Southern Division, rendered its decision in this case on December 1, 1942, and a copy of the opinion of the Court is appended to this statement as Exhibit "A".

Dated: December 31, 1942.

Respectfully submitted,

EARL WARREN,
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Attorneys for Petitioners and Appellants, State of California and Board of State Harbor Commissioners for San Francisco Harbor.

EXHIBIT "A".

(Filed August 20, 1942.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

No. 22000-R.

STATE OF CALIFORNIA and BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR, *Petitioners*,

vs.

UNITED STATES OF AMERICA and UNITED STATES MARITIME COMMISSION, *Defendants*.

No. 22002-L.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners, *Petitioner*,

vs.

UNITED STATES OF AMERICA and UNITED STATES MARITIME COMMISSION, *Defendants*.

Before Healy, Circuit Judge; St. Sure and Roche, District Judges.

HEALY, Circuit Judge:

Following its investigation of certain practices of the petitioners and eighteen other terminals in the San Francisco Bay area, the United States Maritime Commission made an order which the petitioners here seek to enjoin.[1] Petitioners' suits have been consolidated, and a three-judge court assembled pursuant to 28 USCA § 47.

The Maritime Commission's hearing was conducted before a trial examiner who made recommendations later put

[1] The Commission's order is reported in 2 U. S. M. C. 588. Petitioners' suits are brought pursuant to 46 USCA § 830 and 28 USCA § 46.

into effect by the order. The Commission found that there is a lack of uniformity in the rules and practices of the terminals in the Bay area in regard to free-time allowance, and that the manner in which they are applied affords opportunity for unequal treatment of shippers; also, that such rules and practices are unduly prejudicial and preferential in violation of § 16, and unreasonable in violation of § 17 of the Shipping Act, 1916, as amended.[2] It found further that the regulations and practices in respect of demurrage and storage charges are lacking in uniformity, and that, as a whole, the terminals are furnishing wharf storage services at non-compensatory rates, resulting in the unequal treatment of users and nonusers of such services; likewise, that these rules and practices are in violation of §§ 16 and 17 of the Act.

As defined by the Commission, free time is the period allowed for the assembling of cargo upon, or its removal from the wharves. Wharf demurrage is the charge accruing on cargo left in possession of the terminal beyond the free-time period. Demurrage is a penalty charge designed to force the cargo off the wharves and thereby clear them for other traffic. In lieu of demurrage, or upon the expiration of the demurrage period, a storage charge may be assessed at a lower rate. As a remedy for the existing abuses, the Commission prescribed a table of free-time periods, the

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[2] Section 16, 46 USCA § 815, provides in part: "It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17, 46 USCA §816, provides in part: "Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

terminals being ordered to abstain from allowing longer periods than those prescribed.[3] As to demurrage and storage, it prescribed: (a) a penalty charge of 5¢ per ton per day upon cargo remaining beyond the free-time period and not declared for storage, with the further provision that when cargo is not declared for storage by the fifth day it shall automatically go into storage; (b) a storage charge, varying wth different commodities, and based on a fifteen-day period or fraction thereof; and (c) a handling charge, likewise varying with different commodities, to be assessed when cargo goes into storage. The terminals were ordered to abstain from assessing demurrage and storage charges at less than the prescribed rates, but the order was without prejudice to the establishment of higher rates when they were justified and it did not require the reduction of any higher rates then in effect. There was a further requirement that the terminals file with the Commission and keep open to public inspection schedules showing all the rates and charges for the furnishing of wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The rates and regulations imposed appear to be identical with those prescribed by the California State Railroad Commission for private terminals in the Bay area.[4] The latter order grew out of the State Commission's investigation, commenced in 1935, of the "chaotic" conditions prevailing in the terminals. The major problems, said the

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[3] The table of prescribed free-time periods, exclusive of Sundays and holidays, is as follows:

	In-bound Days	Out-bound Days
Coastwise and Inland Waterway	5	5
Intercoastal	5	7
Foreign	7	7
Transshipment	10	10

This schedule is without prejudice to a longer period, not in excess of 21 days, on petroleum or products thereof, destined to trans-Pacific ports; and without prejudice to the establishment of reasonable rules and regulations in connection with free-time allowances.

[4] Decision No. 29,171, Case No. 4090, Railroad Commission of the State of California (1936).

State body, were "the inadequacies of the revenues of the terminal operators, the diversion of tonnage through absorptions, and the existence of discriminatory rates between users of the services." A study of terminal operations and revenues was made by agents of the State Commission and the results were set out in a preliminary and a final report, referred to as the Edwards-Differding reports. Based upon their analysis of the cost of rendering the various services, and considering also such factors as competition between terminals and the ability of the traffic to pay, Edwards and Differding recommended the rates and regulations subsequently adopted. Their studies did not extend to the State and municipal terminals, since the State Commission has no jurisdiction over them; and, owing to competitive conditions, the State Commission's order was expressly conditioned upon the voluntary adoption of similar measures by the publicly owned terminals. It appears that all of the terminals, both public and private, have adopted the recommendations of the State Commission as to toll, dockage, and service charges, but not those relating to free time, demurrage, and storage. The Edwards-Differding reports were admitted as evidence in the proceeding before the Maritime Commission, and there was also testimony by Differding. It is conceded that these reports form the basis of the order here under attack.

Both petitioners are public agencies. The members of the Board of State Harbor Commissioners for San Francisco Harbor are appointed by the governor. The function of the Board is to provide the facilities for handling freight and passengers on the San Francisco waterfront. It controls the piers and wharves, all of which are owned by the State, and it operates the Belt-Line terminal railroad. The board assigns pier space to the various steamship lines, giving them a preferential use of the piers, for which it charges a rental.[5] It also collects dockage on vessels and tolls on cargo, as well as demurrage and storage charges. All revenues from handling, loading, and accessorial services are collected and retained by the assignees. The Board

[5] Two of the piers are assigned to private operators, namely, Golden Gate Terminals and State Terminal Company.

is not authorized to make a profit from its operations. It is, however, required to collect sufficient revenue to enable it to perform its duties and pay the principal and interest on its bonds.[6]

Oakland, a municipal corporation, operates several terminals directly, and others it leases to private operators. The facilities are managed and the rates fixed by the Board of Port Commissioners of the Port of Oakland. Deficits in operation are made up by taxation.[6a]

1. Little attention need be given the first argument advanced by the petitioners, namely, that their terminal operations are sovereign or governmental in character, hence are constitutionally immune from Federal control. We do not inquire whether the functions performed are governmental or proprietary, for in either event they are subordinate to the power of Congress to regulate interstate commerce. *United States* v. *California*, 297 U. S. 175.[7] The petitioners contend that since they do not actually handle the cargo which passes through the terminals they are not engaged in "commerce." But their terminal activities bear immediately and substantially upon the flow of goods in interstate and foreign commerce, and it is immaterial that they are not themselves engaged in commerce, as such, or that their activities may be wholly intrastate, *United States* v. *Darby*, 312 U. S. 100, 118; *United States* v. *Wrightwood Dairy Company*, 315 U. S. 110, 121.

2. The provisions of §§ 16 and 17 of the Act apply to a common carrier by water or "other person subject to this chapter." The latter phrase is defined in § 1, 38 USCA § 801, as meaning "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or

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[6] Sections 3080 and 3084, Harbors and Navigation Code of California (1937).

[6a] Success of the terminal operations of Oakland is measured by the industrial development of the city.

[7] See also *Parkersburg & Ohio River Transportation Company* v. *Parkersburg*, 107 U. S. 691, 701; *State of California* v. *Anglim*, 9 Cir., —— F. 2d ——.

other terminal facilities in connection with a common carrier by water." The same section further states that "the term 'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country."

The major contention advanced appears to be that the Shipping Act of 1916 does not apply to the petitioners in that neither of them is a "person" as that term is defined in the Act. Various reasons are marshaled in support of the contention. It is said that since Congress was at pains to specify the particular entities embraced by the term "person," it must have intended to exclude those not mentioned; that it is a canon of construction that a sovereign is presumptively not bound by its own statute unless specifically named in it; that petitioners are not to be classed as "other persons" subject to the Act for the reason that they are not "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water," more specifically, that they are not carrying on a business, and that, assuming they are, it is not in connection with a common carrier by water.

It is plain that the statutory enumeration of the entities falling within the term "person" is not exclusive, and was not intended to be so. If it were otherwise, the curious result would follow that even an individual is not a "person" within the intendment of the Act. In Georgia v. Evans, — U. S. —, decided April 27, 1942, the court held that the term "person," as similarly defined in the Sherman Act, includes a state. The court observed that whether the word "person" or "corporation" includes a state "depends upon its legislative environment." Congress knew that a substantial proportion of the wharfinger service of the country is provided by public agencies. The salutary purposes intended to be effected by the Shipping Act would largely be defeated if it were to be held that such agencies are outside the scope of the legislation, as witness the dilemma of the California State Railroad Commission in its attempt to deal with the terminal problem in the Bay area.

Moreover, resort to the legislative history of the Act affords some evidence that it was the intent of Congress to make public terminals subject to regulation.[8] As to the canon of construction relied on, the Supreme Court in United States *v.* California, supra, observed that "the presumption is an aid to consistent construction of the statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of the statute fairly to be inferred be disregarded because not explicitly stated." The State of California is not, incidentally, the enacting sovereign in this instance.

It would hardly be consonant with good sense to believe that the petitioners are not in the "business" of furnishing terminal facilities merely because, as is argued, the governing statute forbids or does not contemplate that they make a profit. The phrase "carrying on business" has not so narrow a connotation as that. Indeed, the State law is in disagreement with the contention insofar as it is made by the Board of State Harbor Commissioners. Section 1731 of the Harbors and Navigation Code of California (1937) provides that the president of the Board "shall supervise the conduct of the dock system, the State Belt Railway and all other departments of the harbor business." And see Denning *v.* State, 123 California 316, 321, in which the California Supreme Court observed that the Board is authorized to conduct the "business of wharfinger." It is equally plain that the business of petitioners is conducted "in connection with a common carrier by water." It is inadmissible to suppose that this phrase limits the definition of "other per-

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[8] During the discussions in the Committee of the Whole House on H. R. 15455, which later became the Shipping Act, reference was made to the fact that large sums of money had been invested in municipal docks by such cities as New York, Seattle, San Francisco, and Los Angeles, and the question was asked whether it was the intention of the bill to take away the control of these municipal wharves from the cities which had constructed them. To this question the chairman of the Committee on the Merchant Marine and Fisheries (the committee in charge of the bill) made the following reply: "Not at all; only to prevent unjust discrimination between shippers. If they do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." 53 Cong. Rec. 8276.

sons" to those whose operations form part of the act of water transportation, for the result would follow that no persons are affected other than common carriers by water. We need not labor the point. The statutory verbiage seems clear enough as it stands. The petitioners are plainly within the definition of those furnishing terminal facilities in connection with common carriers by water.

3. We turn to the contention that the order exceeds the authority conferred upon the Commission by §§ 16 and 17.

The order, insofar as it relates to free time, is clearly valid. The allowance of free time is a "regulation or practice" within the contemplation of § 17, and the petitioners do not attack as unreasonable the maximum free-time periods fixed. The periods prescribed are substantially the same as those already in effect on the San Francisco waterfront; and Oakland's assistant port manager testified that they are reasonable and proper. All parties agree that the question of free time is tied in with the need to keep the transit sheds clear for the purpose of cargo movement. Moreover, lack of uniformity in the practices of particular terminals in regard to extensions of the free-time period results in the giving of undue preferences and advantages, in violation of § 16.[8a]

But the power of the Commission to establish minimum wharfage rates stands on a somewhat different footing. The Commission disavows authority to fix the rates of the petitioners. What it does lay claim to is the authority and the responsibility of preventing discriminatory and unreasonable practices, and it says that it is "not to be deterred by the incidental effect of its action upon rates." In a sense, the whole problem may be said to grow out of the uncontrolled practices regarding free time. There can be no question but that the furnishing of storage at nominal rates, upon the expiration of the free-time period, amounts

[8a] In its findings the Commission states: "Under the stress of competition, most of the larger terminals, in cases of emergencies, extend the free time either to cover the additional number of days of delay to the vessel, or, in the case of Oakland, to such number of days as 'is warranted and equitable in each individual case,' according to the judgment of the Port Manager."

substantially to an extension of the free time.[8b] The difference is merely one of degree. It is difficult to see how the discriminatory and unreasonable practices found to be existent can be corrected unless the terminals are ordered to put a platform beneath the charges imposed where goods are left beyond the free-time period. Cf. Merchants Warehouse Co. *v.* United States, 283 U. S. 501, 513. The rates approved, it should be remembered, were expressly found to be not in excess of cost.

Under § 16, the Commission has power to prevent discrimination between shippers "in any respect whatsoever," and this power has been held to extend to matters of rate discrimination. Compagnie Generale Transatlantique *v.* American Tobacco Co., 2 Cir., 31 F. 2d 663, 666, cert. denied 280 U. S. 555; Booth SS. Co. *v.* United States (D. C. N. Y.), 29 F. Supp. 221. But the present order does not stop with the requirement that all shippers who leave their goods on the wharves beyond free time shall be charged demurrage and storage at uniform rates; it goes further and prescribes the level below which those rates are not to fall. The discrimination said to justify the order is not between shippers who avail themselves of the storage services; it is between the users and nonusers of the service. As the report of the Commission states "the users of the wharf storage services are not providing their proper share of essential terminal revenues," and "a disproportionate share of this burden is being passed to users of other terminal services." The Commission further observed that "the practice of furnishing one service below cost has the tendency to prevent any downward revision of rates for other services, however justified they may be."

Section 16 of the Shipping Act is substantially identical with § 3(1) of the Interstate Commerce Act,[9] 49 U. S. C. A. § 3(1), which has been held applicable to rate discrimination

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[8b] The Commission found that, while the demurrage rates of the San Francisco Board are designed to, and do, accomplish the purpose of clearing the piers for intransit cargo, nevertheless, in order to be competitive, the Board provides a lower "bulkhead" storage rate for cargo not occupying essential transit space.

[9] Cf. United States *v.* Tozer, 29 F. 904, 906.

of the same character as that involved here. In Ex Parte No. 104, Part VI, Warehousing and Storage of Property by Carriers at the Port of New York, 198 I. C. C. 134, 216 I. C. C. 291, and 220 I. C. C. 102, the Interstate Commerce Commission held that the practice of certain railroads in furnishing storage to shippers at non-compensatory rates results in undue prejudice to those shippers whose commercial practices do not permit of their placing their goods in storage, but require direct shipment from shipside to destination. The prejudice was found to extend to "all persons who are compelled to bear the carrier's transportation rates which are dissipated by their storage practices," 216 I. C. C. 291, 351. This administrative decision, involving § 3(1) of the Interstate Commerce Act, was upheld in Baltimore & Ohio Railroad Company *v.* United States, 305 U. S. 507, substantially on the grounds advanced by the Interstate Commerce Commission. While the case involved other sections of the Act as well as § 3(1), the holding appears to be that the former section, standing alone, would support the Commission's order. The important matter to be noted is that the discrimination discussed by the Supreme Court did not result from the failure of the railroads to treat all shippers alike, but from the fact that certain shippers were not in a position to take advantage of the non-compensatory warehousing service.

While we have considered we have not discussed all the arguments made by the petitioners in respect of the point, and we think it unnecessary to do so. For reasons already given we are of opinion that the order of the Commission in respect of minimum wharfage charges has support in § 16 of the Shipping Act, if not in § 17.

4. The Edwards-Differding studies did not extend to the petitioners' operations, but the record supports the inference that the petitioners' costs were not substantially less than the costs of other terminals in the Bay area. The studies did include the Howard, Encinal, and Parr-Richmond terminals in the East Bay area, as well as the two privately operated piers on the San Francisco waterfront, namely, Golden Gate Terminals and State Terminal Company. The rates recommended by the experts and adopted by the Com-

mission were based on the lowest unit costs, both fixed and operating, of the terminals studied; and there is testimony that such costs have increased since the investigation. Under these circumstances, and in view of petitioners' failure to introduce any evidence tending to show that their costs were lower than those prevailing at the other terminals, we think the Commission was justified in concluding that the minimum rates prescribed were not above the petitioners' cost of rendering the service.

Oakland complains that the Commission should have considered only the out-of-pocket expenses incident to the rendition of the service, and should not have included, as it did, the fixed cost of providing floor space. But we believe that the determination of the proper cost basis should be left to the discretion of the Commission. Certainly we can not say that the formula adopted by it is unreasonable. Cf. Swayne & Hoyt Ltd. *v.* United States, 300 U. S. 297, 304; Virginia Ry. Company *v.* United States, 272 U. S. 658, 663.

5. The Board claims that the order is in conflict with § 9, Article I, of the Constitution, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Since the rates in certain of the Pacific Northwest ports are somewhat lower than those prescribed for the Bay area terminals, the order is said to bestow an unlawful preference on those ports. We note again, in passing, that the Maritime Commission's order is substantially identical with the order of the State's own regulatory body. Moreover, the conditions in the other ports are not shown to be the same. It is enough to say that the order does not affect the rates and practices of any terminal outside the Bay area. As said in Pennsylvania *v.* Wheeling & Belmont Bridge, 18 Howard 421, 435, "what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states." There is no discrimination of that character here.

Another contention is that the order is invalid for the reason that it gives an undue preference or advantage to the Northwest as a "locality," within the phraseology of § 16 of the Shipping Act. But the statute obviously refers to

discrimination between shippers. The rates and regulations prescribed by the order are uniformly applicable to all localities which seek the use of petitioners' terminal facilities.

We find that the Maritime Commission had lawful authority to make its regulatory order, and that the same is valid. It is therefore ordered that petitioners' motion for a permanent injunction be denied and the proceedings dismissed, upon preparation of findings of fact and conclusions of law. Petitioners will pay costs.

WILLIAM HEALY,
United States Circuit Judge.
A. F. ST. SURE,
United States District Judge.
MICHAEL J. ROCHE,
United States District Judge.

8-17-42.
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